

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Dental Fix Rx LLC for)	CG Docket No. 02-278
Retroactive Waiver of 47 C.F.R. §)	
64.1200(a)(4)(iv))	CG Docket No. 05-338

**COMMENTS OF SUZANNE DEGNEN, D.M.D., P.C., ON PETITION OF
DENTAL FIX RX LLC FOR RETROACTIVE WAIVER OF
47 C.F.R. § 64.1200(A)(4)(IV)**

I. INTRODUCTION

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv)—the regulation requiring opt-out notices on fax advertisements sent with “prior express invitation or permission”—to defendants in TCPA actions and allowed “similarly situated” persons to seek waivers. The Commission noted that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” But it warned, “in light of our confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice, we expect that parties will make **every effort** to file within six months of the release of this Order” (emphasis added).

Here, Petitioner waited until September 11, 2015 (or whatever short period of time it took to prepare the document) before making **any effort** to file its Petition. No good cause exists to grant the Petition, nor does the Commission have authority to so.

II. DISCUSSION

A. **The Commission has no authority to “waive” violations of the regulations prescribed under the Telephone Consumer Protection Act in a private right of action, and doing so would violate the separation of powers.**

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,” 47 U.S.C. § 227(b)(3), and directs the Commission to “prescribe regulations” to be enforced in those lawsuits, 47 U.S.C. § 227(b)(2). On October 30, 2014, the Commission reaffirmed in an Order that 47 C.F.R. § 64.1200(a)(4)(iv) is one of the “regulations prescribed under” Section 227(b)(2). *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order ¶¶ 19–20, FCC 14-164 (rel. Oct. 30, 2014) (Doc. 22-2 (October 30, 2014 Order)).

The “appropriate court” determines whether “a violation” of the statute or the regulations has taken place. 47 U.S.C. § 227(b)(3)(A)-(B). If a court finds a violation, the TCPA automatically awards a minimum \$500 in damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation for violations committed “willfully or knowingly.” 47 U.S.C. § 227(b)(3). The TCPA does not authorize the Commission to “waive” its regulations in a private right of action. *Id.* It does not authorize the Commission to intervene in a private right of action. *Id.* Nor does not require a private plaintiff to notify the Commission it has filed a private

lawsuit. *Id.*; *cf.* Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to EPA to maintain citizen suit). It also does not limit a private plaintiff's right to sue to cases where the Commission declines to prosecute. *Cf., e.g.,* 42 U.S.C. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain "right-to-sue" letter from Equal Employment Opportunity Commission). The Commission plays no role in determining whether "a violation" has taken place, whether a violation was "willful or knowing," whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the "appropriate court" presiding over the lawsuit. 47 U.S.C. § 227(b)(3). Similarly, the TCPA empowers state attorneys general to sue for violations of the TCPA or the regulations prescribed thereunder for \$500 per violation, which the court may increase for willful or knowing violations, as in the private right of action. 47 U.S.C. § 227(g). Such actions must be brought in a federal district court. *Id.* The TCPA requires the state to give notice of such an action to the Commission, which "shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal." 47 U.S.C. § 227(g)(3). The Communications Act, 47 U.S.C. § 201, *et seq.*, also grants the Commission authority to enforce the TCPA through administrative forfeiture actions. 47 U.S.C. § 503(b). Neither private citizens nor state attorneys general have a role in that process, such as determining whether a violator acted "willfully or repeatedly." *Id.*

Thus, the TCPA and the Communications Act create a tripartite enforcement scheme in which the Commission promulgates regulations that may be enforced by private citizens, the states, and the Commission, and where the Commission plays *some* role in state enforcement activities but plays *no* role in private TCPA litigation. *Ira*

Holtzman, C.P.A. v. Turza, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”). This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards, 42 U.S.C. § 7412(d), that are enforceable both in private “citizen suits,” 42 U.S.C. § 7604(a), and in administrative actions, 42 U.S.C. § 7413(d). The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation creating an affirmative defense for “unavoidable” violations in private litigation under the Clean Air Act in *National Resources Defense Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014), holding it is “the Judiciary” that “determines ‘the scope’—including the available remedies” of “statutes establishing private rights of action” *Id.* (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)), and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the courts, not EPA,” *id.* Neither the October 30, 2014 Order nor the Commission’s August 28, 2015 Order granting additional retroactive-waiver petitions (Doc. 22-3) cites *National Resources Defense Council*.

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission “waiver” from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation. *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014). The district court held “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.” *Id.* The district court held that “nothing in the waiver—even

assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3). *Id.* The district court concluded, “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.” *Id.*

The argument that the Commission is merely waiving “its own rules,” rather than the statutory private right of action fails because “[i]nsofar as the statute’s language is concerned, to violate a regulation that lawfully implements [the statute’s] requirements is to violate the statute.” *Global Crossing Telecommc’ns, Inc. v. Metrophones Telecommc’ns, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecommc’ns Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule “has the force of law” and the Commission “may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain ‘just and reasonable’ rates”)). The Commission already ruled in the October 30, 2014 Order that the regulation lawfully implements the TCPA, **so a violation of the regulation is a violation of the statute.**

The argument that a waiver of the opt-out regulation in a private right of action is permissible because “regulations can be applied retroactively” fails because “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). The TCPA does not expressly authorize the Commission to issue retroactive rules. 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 102

(N.D. Ill. 2013). Rather, it authorizes the Commission to “implement” the statute. 47 U.S.C. § 227(b)(2). To “implement” is inherently prospective, meaning “to begin to do or use (something, such as a plan): to make (something) active or effective.” See <http://www.merriam-webster.com/dictionary/implement> (last visited Oct. 8, 2015).

B. Commenter joins the Application for Full Commission Review.

Rather than repeat all of the arguments contained therein, Commenter attaches hereto and joins the Application for Full Commission Review filed on September 25, 2015, by Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC. review of the August 28, 2015 Order issued by the Acting Chief, Consumer and Governmental Affairs Bureau of the Commission in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, DA 15-976 (Aug. 28, 2015).

C. Petitioner made “no effort” rather than “every effort” to file its retroactive waiver petition within six months of the release of the October 30 Order.

Petitioner failed make *any* effort to file the September 11, 2015 Petition until well after April 30, 2015. It is not claiming that its had hired counsel to file the Petition prior to April 30 or that someone forgot to file it by April 30. Rather, Petitioner made *no effort* to file under it got caught by Suzanne Degnen, D.M.D., P.C., a small dental practice in St. Louis County that is tired of receiving junk faxes and is not interested in having one Petitioner’s Missouri franchisee, <http://dentalfixrx.com/locations.html#mo> (last visited Oct. 8, 2015), come to Commenter’s office to repair any dental equipment. If the Commission were to grant the instant Petition, the requirement that junk-faxers

make “every effort” to file by April 30, 2015—a generous six months after the October 30 Order was issued—would be rendered meaningless. Under Petitioner’s delay theory, its could have waited until 2019, the last year of the TCPA’s four-year statute of limitations, to see if it would get sued for its TCPA-violating actions, and could still argue that their delay in filing within six months of the October 30 Order should be excused.

D. No good cause exists here to grant a retroactive waiver.
1. Petitioner was not confused.

No good cause exists to grant Petitioner a retroactive waiver. Because the United States District Court for the Eastern District of Missouri has stayed the lawsuit against Petitioner pending resolution of the instant Petition to the Commission, Commenter has had no opportunity to take discovery in order to counter the averment of David Lopez, Petitioner’s CEO, who claimed that “Dental Fix Rx LLC did not understand that it needed to comply with the opt-out notice required for solicited faxed advertisements.” (Pet. Ex. B ¶ 6.) Based on this averment, it is unclear whether Mr. Lopez knew anything about the TCPA. Had he been completely ignorant about the TCPA, his contention that his company did not understand the TCPA’s opt-out requirement, even if true, would not equate with confusion.

There is nothing in the Petition to indicate that prior to sending the junk fax, Petitioner had read or relied on 47 U.S.C. § 227, 47 C.F.R. § 64.1200, *Junk Fax Prevention Act of 2005*, Pub. L. No. 109-21, 119 Stat. 359 (2005), *Junk Fax Order*, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, or *Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787 (2006). There was no

opt-out notice, not even a deficient one, on the page fax Petitioner sent to Commenter's dental office. The waiver only applies to those who were confused about whether opt-out notices were required in the first place. (October 30 Order at 5, 8 ¶ 15, 11 ¶ 22, 12 ¶ 24, 13 ¶ 26 (simple ignorance of TCPA or Commission's attendant regulations is not grounds for waiver).).

CONCLUSION

The Commission should deny the waiver Petition because the Commission lacks authority to grant the waiver, Petitioner made no effort to file the Petition until September 2015, Commenter has not had an opportunity to challenge Petitioner's averments, and Petitioner should be held financially accountable for its fax campaign, which illegally shifted the advertising costs from Petitioner to its targeted dentists.

SCHULTZ & ASSOCIATES LLP

By: /s/ Ronald J. Eisenberg
Ronald J. Eisenberg, #48674MO
640 Cepi Drive, Suite A
Chesterfield, MO 63005-1221
(636) 537-4645
Fax: (636) 537-2599
reisenberg@sl-lawyers.com

Attorney for Commenter
Suzanne Degnen, D.M.D., P.C.

CERTIFICATE OF SERVICE

I certify that on October 8, 2015, I served by email a true and correct copy of these Comments to the following:

Robert M. Einhorn
Kaari Gagnon
ZARCO EINHORN SALKOWSKI & BRITO, P.A.
100 S.E. 2nd Street, Suite 2700
Miami, FL 33131
(305) 374-5418
Fax: (305) 374-5428
reinhorn@zarcolaw.com
kgagnon@zarcolaw.com

Attorneys for Petitioner Dental Fix RX, LLC

/s/ Ronald J. Eisenberg